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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF J.M. and NICOLE R.,	)	
NICOLE R.	)	
Appellant-Respondent,	)	No. 18A02-0709-JV-831
vs.	)	
DELAWARE COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Joseph Speece, Master Commissioner
Cause No. 18C02-0703-JT-37

April 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Nicole R. ("Mother"), a.k.a. Acko Shontay Nicole R., appeals the involuntary termination of her parental rights to her son, J.M., claiming the Delaware County Department of Child Services ("DCDCS") failed to prove by clear and convincing evidence both that the conditions resulting in the removal and continued placement of J.M. outside Mother's care would not be remedied and that continuation of the parent-child relationship poses a threat to J.M.'s well-being. Concluding that the trial court's judgment terminating Mother's parental rights was not clearly erroneous, we affirm.

Facts and Procedural History

Mother is the biological mother of J.M., born on January 1, 1997.[1] On October 29, 2004, the DCDCS filed a petition alleging J.M. was a child in need of services ("CHINS") because Mother, whose whereabouts were unknown, had left J.M. with his aunt but had failed to retrieve her son for at least one week, and the aunt could no longer care for J.M. It was later determined that Mother was "on the run from house arrest" and was subsequently arrested on March 17, 2005. Tr. p. 67. J.M. was adjudicated a CHINS by the trial court on May 11, 2005, and was thereafter made a ward of the State.

In the court's Dispositional and Parental Participation Order issued on September 27, 2005, the trial court ordered Mother to participate in various services in order to achieve reunification with J.M., including, but not limited to, individual and family counseling, random drug screens, and supervised visitation. The Participation Order also

[1] J.M.'s father, Todd M., is not a party to this appeal. Father's parental rights to J.M. were involuntarily terminated on October 24, 2007.

directed Mother to notify her caseworker of any change in living circumstances, to cooperate with the case manager, and to seek, attain, and maintain stable living conditions.

On March 19, 2007, the DCDCS filed a petition for the mandatory termination of Mother's parental rights to J.M. On August 23, 2007, the trial court conducted a fact-finding hearing on the termination petition. On August 27, 2007, the trial court issued its judgment terminating Mother's parental rights to J.M. This appeal ensued.

Discussion and Decision

This court applies a highly deferential standard when reviewing termination of parental rights cases. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). We will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. *Id.*

The trial court concluded that the elements set forth in Indiana Code § 31-35-2-4(b)(2) were satisfied, but it did not issue specific findings. Therefore, the judgment is general in nature. When the trial court enters a general judgment, we will affirm that judgment on any legal theory the evidence supports. *Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 371 (Ind. Ct. App. 2007). We will reverse a judgment as clearly erroneous if we review the record and have a "firm conviction that a mistake has been made. *Id.*

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*,

666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. However, the trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *K.S.*, 750 N.E.2d at 837. Parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *Id.* at 836.

In order to terminate a parent-child relationship, the State is required to allege and prove that:

> (A) one (1) of the following exists:
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> * * * * *
>
> (iiii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two months;
>
> * * * * *
>
> (B) there is a reasonable probability that:
>
> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
>
> (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
>
> (C) termination is in the best interests of the child; and
>
> (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). The State must establish each of these allegations by clear and convincing evidence. *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1234 (Ind. 1992).

Mother does not challenge the trial court's determination that (1) J.M. had been removed from Mother's care and placed under the supervision of the DCDCS for at least fifteen of the most recent twenty-two months, (2) termination is in J.M.'s best interests, or (3) the DCDCS has a satisfactory plan for J.M.'s care and treatment, namely, adoption

by his current foster parents. Rather, Mother challenges the sufficiency of the evidence supporting the trial court's determination that there is a reasonable probability the reasons for J.M.'s removal from Mother's care would not be remedied and that continuation of the parent-child relationship poses a threat to J.M.'s well-being. Specifically, Mother argues that, in light of her admitted serious drug problem, the DCDCS "failed to provide her with a proper treatment plan" and that "had the [DCDCS] been more proactive in offering her the treatment she needed[,] she would have been successful in complying with the court's orders and being reunited with her son." Appellant's Br. p. 10. We cannot agree.

Initially, we point out that Indiana Code § 31-35-2-4(b)(2)(B) is written in the disjunctive, so the trial court need find by clear and convincing evidence only one of the two requirements of subsection (B). *See In re L.S.*, 717 N.E.2d 204, 209 (Ind. Ct. App. 1999), *trans. denied*. Accordingly, we begin by reviewing whether the trial court's determination that a reasonable probability exists that the conditions resulting in J.M.'s removal from Mother's care will not be remedied is supported by clear and convincing evidence.

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the trial court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. In so doing, the trial court may consider the parent's response to the services offered through

the Department of Child Services. *Lang*, 861 N.E.2d at 372. Additionally, the DCDCS is not required to rule out all possibilities of change; rather, it need establish "only that there is a reasonable probability that the parent's behavior will not change." *In re Kay. L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In this case, there is ample evidence to demonstrate that there is a reasonable probability that Mother's behavior will not change and, consequently, that the conditions resulting in J.M.'s removal and continued placement outside Mother's care will not be remedied. The record reveals that the DCDCS initially became involved with the family due to Mother's unavailability to parent when Mother, who had left J.M. with his aunt, failed to retrieve her son because she was on the run from authorities for violation of house arrest. At the time of the fact-finding hearing on the termination petition, Mother remained unavailable to parent J.M. because she was incarcerated in the Delaware County Jail on a parole violation as well as a new pending criminal charge of Possession of Cocaine, a class B felony. Mother's parole officer testified that Mother would remain incarcerated on the parole violation until April 2008 and that any additional time resulting from the pending felony charge would be added to that. Thus, not only was Mother not available to parent J.M. at the time of the termination hearing, but her future availability to parent J.M. was also unknown.

At the initial hearing on the CHINS petition, Mother admitted, generally, that J.M. was a CHINS. She was thereafter ordered to participate in various services, including, among other things, substance abuse assessment and any resulting treatment recommendations, random drug screens, individual and family counseling, and

supervised visitation with J.M. The Participation Order also directed Mother to notify her caseworker of any changes in living circumstances, to cooperate with the case manager, and to seek, obtain, and maintain stable living conditions and employment in order to achieve reunification with J.M. Unfortunately, by the time of the termination hearing, Mother had failed to make any significant progress in any of these areas.

DCDCS case manager Joy Hanaway testified that although Mother completed the substance abuse assessment, she failed to complete the recommended intensive outpatient treatment program, having only attended one class out of eighteen. Also, despite being sentenced to Drug Court[2] in February 2006, Mother refused to participate in the diversionary program that would have allowed her to avoid incarceration had she successfully completed the program.

Hanaway further testified that Mother failed to exercise regular visitation with J.M., due, in part, to several periods of incarceration. Hanaway stated that in 2004, Mother failed to exercise her right to visitation with J.M. In 2005, despite the fact visitation was available to Mother "52 weeks out of the year, [Mother] did not make any visits." Tr. p. 69. In 2006, Mother made sixteen visits, and in 2007, out of thirty-four opportunities to visit, Mother made no visits with J.M. Additionally, Hanaway testified Mother had failed to maintain consistent contact with the DCDCS, having achieved only brief periods of compliance totaling approximately four months out of the approximate thirty-five-month-old case. Likewise, Hanaway testified that Mother had failed to obtain

[2] Delaware County Community Corrections has a Forensic Diversion Drug Court. The Drug Court is a three-year diversionary program wherein a participant's sentence is stayed upon successful completion of the program.

and maintain stable employment and housing throughout the duration of the case. When questioned as to whether she believed there was a reasonable probability that the conditions that resulted in J.M.'s removal and continued placement outside Mother's home will not be remedied, Hanaway responded, "Yes." *Id.* at 73.

Mother's argument that the DCDCS failed to provide her with a proper treatment plan thereby suggesting that it was the DCDCS's fault that she was unable to kick her drug habit is both disingenuous and unavailing. The elements contained in Indiana Code § 31-35-2-4 contain no such requirement. Moreover, our Supreme Court clearly rejected that the requirement of "reasonable services" be read into this statute in *S.E.S v. Grant County Department of Welfare*, 594 N.E.2d 447 (Ind. 1992) (referred to herein as "*S.E.S. II*"), wherein, pursuant to Indiana Appellate Rule 11, it adopted and incorporated by reference the opinion of this court in *S.E.S. v. Grant County Department of Public Welfare*, 582 N.E.2d 886 (Ind. Ct. App. 1991) (referred to herein as "*S.E.S. I*").

In *S.E.S. I*, the mother, who had a long history of problems stemming from her alcoholism, argued that the trial court erred in terminating her parental rights because the Department of Public Works ("DPW") "did not demonstrate that it had offered her reasonable assistance in fulfilling her parental obligations." *S.E.S. I*, 582 N.E.2d at 889. In response to the mother's assertion on appeal, we explained:

> Proof that the parent has been offered reasonable services to assist the parent in fulfilling her parental obligations is not required under I.C. § 31-6-5-4.[3] Prior to 1982 that section required that the petition to terminate

[3] Indiana Code § 31-6-5-4 was repealed by P.L.1-1997, Sec. 157. The applicable version of this statute, Indiana Code § 31-35-2-4, also does not contain any language mandating "reasonable services" by the Department of Child Services in termination proceedings. *See infra*.

> allege that "reasonable services have been offered or provided to the parent to assist him in fulfilling his parental obligations, and either he has failed to accept them or they have been ineffective[.]" I.C. § 31-6-5-4 (1979). However, the legislature specifically deleted that language. Acts 1982, P.L. 183 Sec. 4. Mother urges us to continue to read such a requirement into the statute. She relies upon I.C. § 31-6-1-1(5) which states that it is the purpose of Article 6 "to strengthen family life by assisting parents to fulfill their parental obligations[.]" I.C. § 31-6-1-1 (1990).
>
> We do not accept Mother's construction of the statute. The object of statutory interpretation is to determine and effect the intent of the legislature. . . . . [T]he legislature clearly expressed its intent that the offer of reasonable services by the DPW is not an element by repealing that specific provision. We will not use the general policy statement of Article 6 to judicially rewrite a requirement into I.C. 31-6-5-4 that the legislature has specifically removed.

Id. at 889-90. In *S.E.S. II*, our Supreme Court stated that "[t]he Court of Appeals' opinion [in *S.E.S. I*] was correctly reasoned[,]" and also stated "to the extent [the cases cited by Mother] are interpreted as requiring the agency seeking termination of parental rights to plead and prove that services have been offered to the parent to assist in fulfilling parental obligations, such interpretation would be incorrect." *S.E.S. II*, 594 N.E.2d at 448.

Based on the foregoing, we find that clear and convincing evidence supports the trial court's conclusion that there is a reasonable probability the conditions resulting in J.M.'s removal and continued placement outside of Mother's care will not be remedied.[4] For over two years, Mother was afforded multiple opportunities to participate in services and to combat her drug addiction, including referrals to intensive outpatient therapy

[4] Having determined that the trial court's conclusion regarding the remedy of conditions is not clearly erroneous, we need not address the issue of whether the DCDCS failed to prove that the continuation of the parent-child relationship posed a threat to J.M.'s well-being. *See L.S.*, 717 N.E.2d at 209 (explaining that Indiana Code § 31-35-2-4(b)(2)(B) is written in the disjunctive).

programs and a Drug Court diversionary program. Mother failed to avail herself of these opportunities. "A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change." *Lang*, 861 N.E.2d at 372. Under the facts of this case, it is unfair to ask J.M. to continue to wait until Mother is able to get, and benefit from, the help that she needs. Over two years without improvement is long enough. *See In re Campbell*, 534 N.E.2d 273, 275 (Ind. Ct. App. 1989) (stating the court was unwilling to put child "on a shelf" until her parents were capable of caring for her and that two years was long enough).

Affirmed.

SHARPNACK, J., and BARNES, J., concur.